

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Review of the Section 251 Unbundling)	CC Docket No. 01-338
Obligations of Incumbent Local)	
Exchange Carriers)	
)	
Implementation of the Local)	CC Docket No. 96-98
Competition Provisions of the)	
Telecommunications Act of 1996)	
)	
Deployment of Wireless Services)	CC Docket No. 98-147
Offering Advanced Telecommunications)	
Capability)	

**REPLY OF THE
TELECOMMUNICATIONS REGULATORY BOARD
OF
PUERTO RICO**

The Telecommunications Regulatory Board of Puerto Rico (“the Board”) hereby submits its Reply to Comments filed in response to a Petition for Waiver filed by the Board pursuant to Section 51.319 of the Federal Communications Commission (“FCC” or “Commission”) rules. In the Petition, the Board asked that the Commission waive its rule exempting incumbent local exchange carriers (“ILECs”) from unbundling local circuit switching to serve Puerto Rico end users using DS1 capacity and above loops. The Board filed the Petition on December 30, 2003 in compliance with the requirements of the Commissions *Triennial Review Order*.¹

¹ *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, 96-98 and 98-147, FCC 03-06, Report and Order and Order on Remand and Notice of Proposed Rulemaking (rel. August 21, 2003) (“*Triennial Review Order*” or “*TRO*”).

The *TRO* found that, on a nationwide level, requesting telecommunications carriers are not impaired without access to local circuit switching in the “enterprise” market, *i.e.*, customers using DSI and above capacity loops. The Commission provided, however, that any state wishing to rebut this finding could do so via a Petition. The Board conducted a detailed hearing on the matter and concluded that operational barriers present in the various Puerto Rico markets cause requesting telecommunications carriers to be impaired without access to unbundled local switching for the enterprise market.

Three parties filed Comments in this proceeding: Telefónica Larga Distancia de Puerto Rico (“TLD”), WorldNet Telecommunications Inc. (“WorldNet”) and Puerto Rico Telephone Company (“PRTC”). Both TLD and WorldNet, competitive carriers in Puerto Rico, support the Board’s Petition. WorldNet points to the significant lag in switch deployment and collocated networks as reasons to find the Puerto Rico market distinguishable from any “nationwide” finding of non-impairment. TLD also supports the Petition’s reasoning that local competition in Puerto Rico is not well developed. TLD points out that deployment of switching capacity is not a viable alternative in Puerto Rico because the cost of acquiring a switch is extremely high relative to the potential for revenues generated.

PRTC opposed the Board’s Petition claiming that its analysis was “unencumbered” by the FCC’s conclusions and “deeply flawed.” Further, among other “serious errors” are an arbitrary exclusion of evidence and consideration of irrelevant factors.

In this Reply, the Board will address the PRTC Comments. We urge the Commission to find no merit in PRTC’s self-serving opposition and to grant the Board’s Petition.

DISCUSSION

I. The Board Has Met the Burden

PRTC claims that the Board has not met its burden in seeking waiver of the “no impairment” standard because it failed to consider specific evidence not considered by the Commission and because it did not specifically address economic impairment issues.

Under the longstanding criteria of the *WAIT Radio* case, the Commission may waive its rules if good cause is shown and if granting the waiver would not undermine the policies sought to be achieved.² In this case, where the Commission has invited states to seek to waive a general finding with more specific knowledge and expertise, it is clear that, in special circumstances, the purpose behind the rule – increasing competitive opportunity – would be served by grant of a waiver. Moreover, contrary to PRTC’s implication, the Commission did not specifically consider information concerning the Puerto Rico market. In fact, nowhere in the 840 paragraphs of the *TRO* is Puerto Rico even mentioned. The Commission did not deliberately decide that evidence of market failure provided for the record by WorldNet was insufficient to overcome a “nationwide” finding of no impairment.

Rather, it is clear to the Board that the Commission sought to rely upon state commissions “to evaluate local market conditions”³ a task the Commission did not undertake. The Board’s Petition is the result of that evaluation, an evaluation of all the evidence informed by the unique knowledge of local parties. The Board conducted an intense proceeding focusing on local issues and including evidence not provided to the Commission. Thus, PRTC is wrong to suggest that the Board is attempting to second guess the Commission based on the same evidence.

² See 47 C.F.R. § 1.3, *WAIT Radio v. Fle*, 418 F.2d 1153 (D.C. Cir. 1969).

³ See at ¶ 455.

In addition, PRTC is wrong when it argues that a state commission must present evidence of both operational and economic barriers in a particular market. Section 51.319(d)(3)(1) makes it clear that:

... a state commission wishing to rebut the Commission's finding should petition the Commission to show that requesting telecommunications carriers are impaired without access to local circuit switching to serve end users using DSI capacity and above loops in a particular geographic market [...] if it finds that operational *or* economic barriers exist in that market.⁴

Thus, a state commission is not required to include *both* operational *and* economic barriers in its Petition. Consequently, the Board has met its burden in proceeding with its Petition by focusing only on operational characteristics at this time.

II. The Board's Analysis Is Not Flawed

PRTC claims that the Board has failed to provide evidence or argument to show that Puerto Rico is unique or why competitive entry is more difficult in Puerto Rico than in other parts of the country. Whether competition is less developed in Puerto Rico is not relevant, claims PRTC. The relevant question is whether enterprise switching is "suitable" for competitive supply, which the fact that there is a facility based CLEC operating in Puerto Rico amply demonstrates.

The Board disagrees. The fact that there is only one CLEC with switching capability, in a large vital market such as San Juan, demonstrates the barriers to entry. PRTC is wrong to suggest that the criteria is not relative since the whole point of the Petition is a comparative one – to rebut a nationwide finding. In comparison to nationwide CLEC switch deployment, the fact that there are only four CLEC switches in Puerto Rico shows that there is no "significant" switch

⁴ 47 C.F.R. § 51.319(d)(3)(i) (emphasis added).

deployment. This comparison is important in distinguishing the Puerto Rico market from the “nationwide” conclusion.

PRTC argues that the number of switches is irrelevant given the greater capacity and flexibility of newer CLEC switches, compared to its “legacy” network. Most importantly, it is the simple existence of a facilities-based competitor that defeats the Board’s Petition, according to PRTC. Centennial’s success demonstrates that facilities-based entry is economically possible and cannot be “uneconomic,” claims PRTC.

However, the Board’s Petition is not based on economic considerations. Rather, the Board found significant *operational* barriers to entry. In its Petition, the Board followed the Commission’s direction for its consideration of operational characteristics.⁵ It considered:

- (1) the incumbent’s performance in provisioning loops;
- (2) difficulties associated with obtaining collocation space due to lack of space or delays in provisioning by the incumbent;
- (3) difficulties associated with obtaining cross-connects in the incumbent’s wire center;

By its own admission PRTC has *never* provided a stand alone UNE loop to a CLEC in Puerto Rico; it has *never* provided a cross-connect to a CLEC in Puerto Rico. PRTC claims that this is because it has never been asked for UNE loops or cross connects, but it would be ready to do so when asked, particularly since billing problems have been resolved. However, the Board found evidence to the contrary.⁶ And it is only common sense to realize that an ILEC that has never provided a UNE loop or cross connect is not able to do so well enough to support a “no impairment” finding.

⁵ See 47 C.F.R. § 51.319(d)(3)(i)(A).

⁶ Petition at note 27.

With regard to collocation, the Board considered an extensive record containing convincing evidence that Centennial's problems in its three year quest for collocation were more attributable to PRTC's intransigence than to missteps by Centennial.⁷ For example, Centennial did decide to use its own subcontractors to build the collocation arrangements, as PRTC maintains. However this decision was taken because of the extensive delays Centennial encountered in using PRTC to make the arrangements. While it has resulted in factors being "outside of PRTC's control," Centennial believed it needed its own subcontractor precisely so as to take the matter out of PRTC's control.

In sum, the Board looked to the three operational characteristics the Commission requires to be considered: provision of loops, difficulties in obtaining cross-connects and difficulties in obtaining collocation. In the two former cases, PRTC has had *no* experience. In the latter, the difficulties have prevented *any* timely collocation arrangement from being established despite a three year effort on the part of one CLEC. These facts led the Board to its conclusion that the Puerto Rico market was so unlike the "nationwide" market that an exception to the general "no impairment" Rule is required.

III. The Petition Is Not Flawed By Serious Error

PRTC claims that the Petition contains serious errors, including the exclusion of evidence relating to wireless switches, and the consideration of irrelevant factors. Again, PRTC is wrong.

With regard to the accusation that the Board considered irrelevant factors such as evidence of failures in the provision of Local Number Portability and easements, this information

⁷ PRTC maintains that the Board improperly excluded evidence that would have shown Centennial to have been largely responsible for the three year delay in collocation. The Board determined that this evidence was deliberately withheld until it was too late for other parties to respond adequately, given the FCC's deadline for filing the Petition. Consequently, the Board excluded this evidence.

was not irrelevant as it points to an overall pattern of failure and inexperience in the Puerto Rico market.

With regard to evidence that wireless switches can be upgraded to provide wireline services to enterprise customers, the Board correctly did not accord weight to an anomaly in the marketplace which, in any case, is limited to one competitor. To find that the possibility of a wireless switch upgrade outweighs probative evidence of market failure makes a burlesque of the proceeding.

IV. CONCLUSION

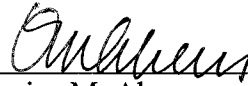
At heart, PRTC argues that it is ready willing and able to provide essential services necessary to avoid continuation of the requirement that it provide enterprise switching. However, the weight of the evidence reviewed by the Board supports the conclusion that there are serious operational barriers that impair CLEC provision to services. Those barriers particularly exist in the three areas the Commission specifically required state commissions to consider: loop provisioning, collocation and cross-connects.

The Board has concluded that these operational barriers pose a present impairment, which conclusion will be revisited in two years. For these reasons, the Board urges the Commission to grant its Petition for Waiver.

Respectfully submitted,

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February 13, 2004